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In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, PETITIONER

v.

E. B. HOUGHAM, OWEN DAILEY, WILLIAM E. SCHWARTZE AND HARLAN L. MCFARLAND

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CITATIONS

534319—59——1

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on April 14, 1959.

OPINIONS BELOW

The opinion before trial of the United States District Court for the Southern District of California (R. 43)[1] is reported at 148 F. Supp. 715. That court's oral opinion after trial (R. 437), and its findings of fact, conclusions of law, and judgment (R. 105) are not reported. The opinion of the court of appeals (App., *infra*, pp. 13–19) is reported at 270 F. 2d 290.

[1] All record references are to the pages of the "Transcript of Record" printed for the use of the court below and filed here pursuant to Rule 21 of this Court.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1959 (App., *infra*, p. 19). A timely petition for rehearing was denied on September 23, 1959 (App., *infra*, p. 20). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the provisions of the Surplus Property Act explicitly conferring on the United States the right to elect which of three measures of damages is to be applied in recovering for fraud in obtaining Government property permits the trial court, rather than the Government, to make the election.

STATUTE INVOLVED

Section 26 of the Surplus Property Act of 1944, 58 Stat. 765, 780, 50 U.S.C. App. (1946 Ed.) 1635, (repealed, and reenacted by Section 209 of the Federal Property and Administrative Services Act of 1949,* 63 Stat. 377, 392, 40 U.S.C. 489), provides in pertinent part as follows:

> (b) Every person who shall use or engage in or cause to be used or engaged in any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Government agency in connection with the disposition of property under this Act; or who en-

* The 1949 reenactment made no change material here. In addition, all of the sales in question here took place before the 1949 reenactment.

ters into an agreement, combination, or conspiracy to do any of the foregoing—

(1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit; *or*

(2) shall, if the United States shall so elect, pay to the United States, as liquidated damages a sum equal to twice the consideration agreed to be given by such person to the United States or any Government agency; or

(3) shall, if the United States shall so elect, restore to the United States the property thus secured and obtained and the United States shall retain as liquidated damages any consideration given to the United States or any Government agency for such property.

* * * * *

(d) The civil remedies provided in this section shall be in addition to all other criminal penalties and civil remedies provided by law.

STATEMENT

This suit was filed by the United States to recover civil damages from the respondents who had fraudulently obtained certain Government surplus property in violation of Section 26 of the Surplus Property Act. 58 Stat. 765, 50 U.S.C. App. (1946 Ed.) 1635. In general, the complaint alleged that respondent Hougham, doing business as Baker's Motor Market, conspired with respondents Dailey, Schwartze and McFarland, who were veterans, to violate the Act. The substance of the charge was that Hougham used

the named veterans as front men to purchase for him, with the use of the veterans' priority certificates, surplus property vehicles to which Hougham was not otherwise entitled. The complaint sought $2,000 for each violation of the Act, plus double the amount of actual damages sustained by the Government, all under Section 26(b)(1) of the Act. *Supra*, pp. 2-3. Thus, on the basis of the respondents' fraudulent purchases in 168 surplus property transactions, the complaint claimed $336,000 plus double damages (R. 3-23).

The United States thereafter moved for leave to file a first amended complaint which sought instead, under Section 26(b)(2) of the Act, *supra*, pp. 2-3, twice the consideration agreed to be given to the United States for the fraudulently obtained property. Since the respondents had agreed to pay and had paid $79,512.66, the complaint sought $159,025.32, or a sum substantially less than demanded in the original complaint (R. 25-43). The district court, however, denied the Government's motion, holding that it had made an irrevocable election of remedies by filing its initial complaint (R. 116). In paragraph VII of its Pretrial Conference Order (R. 101), the district court stated that the following issue of law remained to be litigated upon the trial:

> B. It is the contention of plaintiff that it is entitled to double the amount of the sales price of the vehicles described in the Second Amended Complaint, namely twice the sum of $13,671.02 for Count One, twice the sum of $38,131.13 for Count Two, and twice the sum of $27,710.51 for Count Three. Previously the Court has indicated that an irrevocable election

has been made by the United States by virtue of the successive complaints on file. It is the contention of plaintiff that it is entitled to make its election at any time prior to judgment. Plaintiff elects, in the event of judgment in its favor, to receive as liquidated damages a sum equal to twice the consideration agreed to be given to the United States or federal agency involved. Plaintiff respectfully calls this to the attention of the Court so that the point may be preserved for purposes of appeal.

The trial proceeded after the Government had filed a second amended complaint which sought $2,000 for each violation, under Section 26(b)(1) of the Act (R. 116–117).

During the trial, the United States placed in evidence as separate exhibits detailed sales folders containing sales documents bearing respondents' signatures (R. 149, 211, 215, 216–217, 230, 272, 279, 282) and describing the sales of property which took place. In this fashion, every specific sale alleged in the second amended complaint was proved to have been made as alleged.[3]

[3] The following schedule lists the record references for proof of Hougham's purchases through the other respondents and the specific price at which each sale and purchase was made.

	Record Reference
Respondent Dailey:	
General admission as to about 110 vehicles.	R. 133–138.
Exhibits 8–75, corresponding to the 68 specific transactions alleged in Count I of the Second Amended Complaint (R. 58–61).	R. 147–166.
Respondent Schwartze:	
Exhibits 76–93, corresponding to the 29 specific transactions alleged in	R. 206–207, 248.

In its findings of fact, the district court found that the Government's property had been obtained fraudulently by purchases of trucks and trailers by the respondents on the various dates described in the three counts of the second amended complaint (R. 106–107, 110–111, 112–1123).*

While ruling that the property had been obtained fraudulently, the district court rejected the Government's contention that the purchase of each vehicle constituted a separate violation of the Act calling for separate imposition of a $2,000 forfeiture, held instead that "* * * the genesis of the whole matter are these applications * * *", and assessed one $2,000 forfeiture for each of the four fraudulent applications for a veteran's priority certificate used for the acquisition of the surplus property (R. 445–446). Accordingly, the Government's recovery was limited to $8,000 (R. 119–120). The Government appealed on the ground that it was entitled to a damage award in the

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(Footnote 3 continued)

	Record Reference
Count II of the Second Amended Complaint (R. 64–65).	
Respondent McFarland:	
General admission as to about 25 vehicles.	R. 222–226.
Exhibits 97–150, corresponding to the 52 specific transactions alleged in Count III of the Second Amended Complaint (R. 68–71).	R. 226–233, 272–282.

* In its findings, the court states:

"Said trucks and trailers are further described in the Second Amended Complaint, Count * * *, Paragraph * * *, pages * * *, inclusive." R. 107(2), 110(2), 112–113(2).

amount of $159,025.32, as computed under Section 26(b)(2) of the Act.[5]

The court of appeals rejected the district court's ruling that the Government was bound by its first complaint under the doctrine of election of remedies. It stated that, at the end of the trial, the Government was entitled to that amount of damages which the court found was established by the evidence, and in one of the three forms provided by the statute. Although the issue of who should select the remedy was neither briefed nor argued in the district court or the court of appeals, the latter *sua sponte* raised the question in its opinion and decided that:

> * * * the trial court had the power to give that form of relief to which he believed the government was entitled. He found the government had proved no actual damages. Therefore, he applied the simple monetary award for each of the proven acts of presentation of a priority certificate [App., *infra*, p. 18].

Treating the district court's selection of remedy in the manner it would treat a factual finding, the court of appeals stated that it could not say on the record before it that the trial court had reached an erroneous conclusion as to the damage awards. It confirmed the district court's rejection of the application of 26(b)(2)'s formula of "twice the consideration agreed to be given", stating that such a recovery was "* * * much more apposite to a contract where the

[5] The respondents also appealed contending that the evidence was insufficient to support the finding of fraud and that the Government's action was barred by limitations. The court of appeals rejected both arguments (App., *infra*, pp. 15–17, 18–19).

property has not passed but a consideration has been agreed upon." (App., *infra*, p. 18). The district court's judgment was thus affirmed.

REASONS FOR GRANTING THE WRIT

The decision below, which gives to the trial court and not the United States the option to select one of the three alternative remedies of the Surplus Property Act, is directly contrary to the explicit language of the Act. It is also inconsistent with the prior understanding of the Act implicitly held by all courts which have passed upon the statute since the days of World War II. Earlier Surplus Property Act matters have all been settled or otherwise handled on the assumption that the Act means precisely what it says when it confers on the "United States" the right to elect one of the three different measures of damages. Moreover, the Surplus Property Act is permanent legislation[6] under which untold quantities of Government surplus will be disposed of in the future. In addition, the decision below, if not reversed, may affect the disposition of 22 cases currently pending in various district courts, 37 other matters in which the filing of an action is under consideration, and an indefinite number of future cases in which dispositions of property under the Act are tainted with fraud. Finally, a conflict, at least in reasoning, between the decision below and that of the Court of Appeals for the Tenth Circuit in another recent Surplus Property Act case emphasizes still further the need for review here.

[6] See footnote 2, *supra*, p. 2.

1. During the fifteen years of administration of these provisions of the Act, no one has ever challenged the right of the *United States* as plaintiff to select one of the statute's three alternative remedies. The courts regularly have noted in cases brought under the Act that the United States as plaintiff, and not the court, is to make the election.[1] The statute's language, "* * * if the United States shall so elect * * *", prohibits any other result. And that the right to elect is in the United States, not in the courts, is fully confirmed by the Senate Report on the bill which became the Surplus Property Act. The Report unequivocally states that "The United States is given the option of electing among three different measures of damages * * *" (S. Rept. 1057, 78th Cong., 2d Sess., p. 14).

In the context of the entire provision for remedies and court jurisdiction in Section 26, it seems plain that the characterization "United States" describes the executive branch which manages the Government's property and brings suit on behalf of the United States when it is harmed. The appellation "United States" is used nine times in subparts (1), (2), and (3) of Section 26(b) of the Act, and the seven references (apart from the two linked to the language of elec-

[1] For example, in *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 150, this Court notes that "The United States limited itself to the recovery * * *"; and in *United States* v. *Doman*, 255 F. 2d 865, 869 (C.A. 3), affirmed *sub nom. Koller* v. *United States*, 359 U.S. 309, the court states that "* * * the United States was to have the option of selecting as its remedy any one of the three different measures of damages * * *".

tion) clearly apply to the executive branch of the Government in the sense just noted, since they refer to restoration of property, retention of money, and payment of consideration to the "United States." Where the courts are properly involved in the Act, Congress had no difficulty in describing "[t]he several district courts of the United States * * *". 40 U.S.C. 489(c).

From the terms and context of the statute, it is thus plain that it is the United States as litigant, and not the trial court, which has the option of electing one of the Act's three remedies.

2. The decision below, in addition to departing from settled judicial recognition of the traditional right of a litigant to a particular remedy of his own choosing,[8] destroys the very purpose of providing the alternative remedies. Because of problems of proof,[9] it is often

[8] Illustrative is the rule that a vendee of real property who anticipates special uses for the land he has contracted to buy is entitled to damages for breach of his contract by the vendor, and is also entitled to specific performance. It is not the court's function, but the litigant's, to decide which remedy it will be; and if he proves all the incidents which equity requires for specific performance, he is entitled to the remedy he seeks. See 1 Pomeroy's *Equity Jurisprudence* (5th Ed.), Section 221b; 4 *id.* Sections 1404, 1405.

[9] The decision below creates an obvious practical problem for litigating counsel who will not know what proof to prepare for trial unless they know which remedy the court will select after trial. It is relatively simple, for example, to prove the consideration agreed to be given under Section 26(b)(2); while proof of the value of surplus property—for the purpose of settling actual damages under Section 26(b)(1)—may well involve the use of trade experts, accountants and other witnesses, and entail costly and extended arrangements. Cautious counsel would accordingly make a record which supports any remedy the court

difficult for the Government to establish the full extent of its loss from fraud. In order to be sure that under every circumstance the Government shall be able to make itself entirely whole, the Congress gave it the option to select the measure of damages which would best fit its need in particular cases. The court below would deprive the Government of that power in favor of a method of selection on some undefined basis which the court feels makes one recovery more appropriate than another.[10] The fact that the court below felt that the measure of twice the consideration agreed to be paid is inappropriate where a transaction has been completed itself illustrates the manner in which a court can deprive the United States of a measure of recovery which Congress certainly did not indicate was to be limited to incomplete transactions.

3. In its essentials, the decision below is in conflict with the principle underlying the recent decision in *Bernstein* v. *United States*, 256 F. 2d 697 (C.A. 10). In *Bernstein*, the district court, on the basis of application of the doctrine of election of remedies,

might select, thus needlessly consuming valuable court time and adding to already congested dockets.

[10] Except for the unwarranted assumption implicit in the court of appeals' statement that "[i]f these words mean that the government is entitled to the particular form of relief it chooses, willy-nilly, *regardless of the evidence* * * *" (App., *infra*, p. 18, emphasis added), there is no indication that the court found fault with the Government's proof, or thought that the Government's case did not warrant Section 26(b)(2) recovery. As we note above, pp. 4–5, the district court ruled the 26(b)(2) recovery inapplicable solely on the basis of the Government's previous election of another remedy. And we have already shown (*supra*, pp. 5–6) the adequacy of the Government's proof to support the 26(b)(2) remedy.

had held the Government to the 26(b)(2) election embodied in its initial complaint. Its rationale was that the Government's subsequent demand alternatively for a different remedy was unfair to the defendants who might have conducted their subsequent business of selling about 30% of the surplus property they had bought in light of the Government's earlier 26(b)(2) demand. In effect, from facts related solely to its own notions of the fairness of choice from among these alternatives, the district court held the Government to its original selection. The Court of Appeals for the Tenth Circuit reversed, rejected the election of remedies doctrine under the Federal Rules of Civil Procedure, and remanded the case with a direction to grant the remedy of restitution which the Government had finally demanded. Thus, the *Bernstein* case stands for the proposition that the Government's final choice of a supported remedy must be respected. In the instant case, however, the court below held that the Government's choice was not controlling. This conflict in principle demonstrates, we submit, the need for review and reversal of the decision below.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition should be granted.

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DECEMBER 1959.

APPENDIX

United States Court of Appeals for the Ninth Circuit

No. 15,873. April 14, 1959

UNITED STATES OF AMERICA, APPELLANT

v.

E. B. HOUGHAM, OWEN DAILEY, WILLIAM E. SCHWARTZE AND HARLAN L. MCFARLAND, APPELLEES

E. B. HOUGHAM, OWEN DAILEY, WILLIAM E. SCHWARTZE AND HARLAN L. MCFARLAND, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

Before FEE, BARNES and HAMLIN, *Circuit Judges*

JAMES ALGER FEE, *Circuit Judge:*

This action was instituted to recover damages on account of the fraudulent acquisition of surplus property in violation of the provisions of the Surplus Property Act of 1944.[1] It was claimed that defendant E. B. Hougham, individually and under the assumed business name of Baker's Motor Market, had Owen Dailey, William E. Schwartze and Harland L. McFarland, the other defendants, purchase for him sur-

[1] 58 Stat. 765, 50 U.S.C.A. (1946 Ed.) §§ 1611-16.

plus property vehicles from the government. These purchases were charged to have been accomplished by the use of priority certificates of veterans which belonged to the other defendants, respectively. It was claimed that Hougham could not otherwise have obtained title to such vehicles.

The record showed that each of the defendant veterans filed with the War Assets Administration an application for a certificate to enable him to purchase war surplus material on a priority basis. Upon the representations in the applications filed by these veterans, priority certificates were issued to each respectively. In each application presented by a defendant veteran, there was a representation reading as follows:

> I am, or will be, directly or indirectly, the sole proprietor of the enterprise described herein, or, that no person or persons, other than veterans, have or will have any proprietary interest in the enterprise, singly or together, directly or indirectly, in excess of 50 per cent of either the capital invested in the enterprise or of the gross profits or income thereof; * * * that said property is to be used in and as part of the enterprise described herein.

The evidence also proved that Hougham had a large establishment, and that defendant veterans were financed by him to purchase the property on the priority certificates; the vehicles were delivered to Hougham, who treated them as his own; the veterans received $10.00 from Hougham.

The cause was tried by the court without a jury. A judgment was entered against Hougham and Dailey for $2,000.00, against Hougham and Schwartze for $2,000.00, and against Hougham and McFarland for $4,000.00. These sums were described as "liquidated damages." The court ruled that the government had presented no proof of actual damage.

A major point raised is whether the action is barred by the Statute of Limitations. The court ruled that no statutory provision was applicable to bar the action.

It was claimed that the bringing of the action was limited by 28 U.S.C.A. § 2462, which reads:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

The trial court ruled that the section above quoted did not apply and that, since the Surplus Property Act of 1944 contained no provision for limitation, the action therein authorized could be commenced at any time. It is significant in this connection that the trial court gave judgment for $2,000.00 for each act.

The exact point has been ruled upon by the Court of Appeals for the Third Circuit in the case of *United States* v. *Doman*, 255 F. 2d 865, 867, where it is said:

> The narrow issue, therefore, is whether Section 26(b)(1) of the Surplus Property Act, which requires a person committing the prohibited act to pay the United States the sum of two thousand dollars for each fraudulent act in addition to double the amount of any damages which the United States may have sustained by reason of Koller's and Silberbrook's activities provides a civil fine, a penalty, or a forfeiture, or merely compensatory damages.

That court, citing the opinion of Judge Jertberg in the instant case, pointed out that the Supreme Court of the United States, in *Rex Trailer Co.* v. *United States*, 350 U.S. 148, had held that the provisions of Section

26(b)(1) are civil and not criminal, although the point of limitation upon an action was not involved, but concluded the later opinion resolved the conflict among the circuits as to the existence of a bar. This Court accepts that solution.[2]

It may be noted, however, that the acts here for which defendants were held liable were committed sometime between March 16 and September 30, 1946, by the filing of respective priority certificates, while the first complaint was filed December 31, 1954. Even if 28 U.S.C.A. § 2462 were applicable, this complaint was timely.[3]

Defendants claim that the Statute of Limitations is particularly important because of the filing of an amended complaint on November 2, 1956. The amended complaint did vary from the original in two particulars. First, the charge of fraud in the original complaint was an alleged false representation that the articles were purchased for personal use of the veteran. The allegation in the second amended complaint was to the effect that the false representation was that the veterans were the owners of more than fifty per cent of the interest in an enterprise and entitled to more than fifty per cent of the profit therein and that the purchase for resale was not for the benefit of any other dealer. The trial court ruled that the first complaint stated a cause of action under the governing statute. We agree and so rule. The minor variation as to the detail of the fraud is not of the essence. Therefore, whether the statute had run when the

[2] See also *United States* v. *Burish*, 3 Cir., 256 F. 2d 571.

[3] 28 U.S.C.A. § 2462, 18 U.S.C.A. § 3287; Proclamation 2714 12-FR-1; *United States* v. *Grainger*, 346 U.S. 235. The government had the full day of December 31, 1954, in which to file the complaint, since hostilities were suspended at noon December 31, 1954.

second amended complaint was filed is of no consequence. The filing of the first complaint in time tolled the running of any applicable statute as to the point.

Second, it is objected that the government sought to claim twice the consideration agreed to be paid in the second amended complaint, whereas in the first complaint it had prayed for $2,000.00 for each act and double the amount of the damages of the government. There are two answers. One, the court only awarded $2,000.00 liquidated damages to the government for each act found. Defendants have no ground to complain, since this measure of recovery was asked by the first complaint. Two, there was only one statutory remedy, as defendants claim. The amount of recovery prayed for had no effect upon substance of the claim. If a cause of action was stated, based upon the statute, the amount of recovery would be based upon the proof. The statute gave the United States three different measures of damages. Under the Federal Rules of Civil Procedure, at the end of the trial the government would be entitled to that which the court found was established by the evidence.

And here it may be well to dispose of the appeal of the government. The claim is that, since there was an election by the agents of the United States under the terms of the statute to claim twice the consideration agreed to be paid, the trial court was bound by the statute to make such an award.

This has been treated as an attempt to bind the government to an election of remedies. As above noted, there is no such question involved here. There is but one statutory cause of action. Based upon the proof at the end of the case, the government could recover damages in one of three forms. These damages in the three sections were not cumulative. The reason for the words at the election of the govern-

ment is to show the noncumulative nature of the provisos. If these words mean that the government is entitled to the particular form of relief it chooses, willy-nilly, regardless of the evidence, and that the court can award that form and no other, unquestionably the proviso constitutes a criminal penalty and the courts which have construed these clauses as providing liquidated damages are wrong. But we have already rejected this thesis.

Since then these provisos give liquidated damages in various forms, the trial court had the power to give that form of relief to which he believed the government was entitled. He found the government had proved no actual damages. Therefore, he applied the simple monetary award for each of the proven acts of presentation of a priority certificate.

This question was not raised at the trial. The trial court unquestionably believed that twice of the consideration "agreed to be paid" was not applicable here. And it seems much more apposite to a contract where the property has not passed but a consideration has been agreed upon. It cannot be said upon the record before us that the trial court reached an erroneous conclusion as to the amount of the liquidated damages which were awarded. The cross-appeal of the government has no merit.

Defendants object that the proof was not sufficient to make a case against any of them. A careful review of the record shows that the trial court correctly held "from all of the evidence that as far as these three men [Dailey, Schwartze and McFarland] it was purely synthetic * * * these men were largely messenger boys in acquiring the surplus vehicles that Mr. Hougham felt he could use in his business." The findings of the trial court were correct. It is unnecessary to burden the reports with a detail of the facts.

Affirmed.

United States Court of Appeals for the Ninth Circuit

No. 15,873

UNITED STATES OF AMERICA, APPELLANT

v.

E. B. HOUGHAM, ET AL., APPELLEES

E. B. HOUGHAM, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

Judgment

Filed and entered April 14, 1959

APPEALS FROM THE UNITED STATES DISTRICT COURT, FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

This cause came on to be heard on the Transcript of the Record from the United States District Court for Southern District of California, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

United States Court of Appeals for the Ninth Circuit

Excerpt From Proceedings of Wednesday, September 23, 1959

Before FEE, BARNES and HAMLIN, *Circuit Judges*

Order denying petition for rehearing

On consideration thereof, and by direction of the Court, it is ordered that the petition of Appellant, filed May 1, 1959, and within time allowed therefor by rule of Court for a rehearing of the above-entitled cause be, and hereby is denied.